

THEODORE J. BOUTROUS JR., SBN 132099
tboutrous@gibsondunn.com
RICHARD J. DOREN, SBN 124666
rdoren@gibsondunn.com
DANIEL G. SWANSON, SBN 116556
dswanson@gibsondunn.com
JAY P. SRINIVASAN, SBN 181471
jsrinivasan@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: 213.229.7000
Facsimile: 213.229.7520

VERONICA S. MOYÉ (Texas Bar No.
24000092; *pro hac vice*)
vmoye@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201
Telephone: 214.698.3100
Facsimile: 214.571.2900

MARK A. PERRY, SBN 212532
mperry@gibsondunn.com
CYNTHIA E. RICHMAN (D.C. Bar No.
492089; *pro hac vice*)
crichman@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

ETHAN DETTMER, SBN 196046
edettmer@gibsondunn.com
ELI M. LAZARUS, SBN 284082
elazarus@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105
Telephone: 415.393.8200
Facsimile: 415.393.8306

Attorneys for Defendant APPLE INC.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

EPIC GAMES, INC.,

Plaintiff, Counter-
defendant

v.

APPLE INC.,

Defendant,
Counterclaimant.

Case No. 4:20-cv-05640-YGR-TSH

**DECLARATION OF RACHEL S. BRASS IN
SUPPORT OF DEFENDANT APPLE INC.'S
ADMINISTRATIVE MOTION TO
PARTIALLY SEAL ITS PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

Pursuant to Civil Local Rule 79-5, I hereby declare as follows:

1. I am an attorney licensed to practice in the State of California, and a member of the Bar of this Court. I am a partner at the law firm Gibson, Dunn & Crutcher LLP, counsel of record for Defendant Apple Inc. (“Apple”) in this case. I am familiar with Apple’s treatment of highly proprietary and confidential information, based on my personal experience representing Apple.¹ I have personal knowledge of the facts stated below and, if called as a witness, I could and would testify competently thereto. I submit this declaration in support of Apple’s Administrative Motion to Partially Seal Its Proposed Findings of Fact and Conclusions of Law.

2. Federal Rule of Civil Procedure 26(c), generally, provides the “good cause” standard for the purposes of sealing documents attached to a dispositive motion or presented at trial. *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). The test applied is whether “‘good cause’ exists to protect th[e] information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality.” *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010) (quoting *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002)).

3. Apple operates in an intensely competitive marketplace. It occupies a unique position as a leader with respect to a number of highly dynamic technologies. Apple has serious and legitimate concerns that competitors will be quick to pounce on any release of Apple’s highly sensitive, proprietary information in order to gain competitive advantage. As such, Apple takes extensive measures to protect the confidentiality of its proprietary information.

4. The Court has “broad latitude” “to prevent disclosure of materials for many types of information, including, *but not limited to*, trade secrets or other confidential research, development, or

¹ Courts in this District routinely grant motions to seal on the basis of declarations of counsel submitted pursuant to Local Rule 79-5. *See, e.g., In Re Qualcomm Litig.*, No. 17-00108, Dkt. 398-1 (S.D. Cal. Mar. 3, 2018); *Avago Techs. U.S. Inc., et al. v. Iptronics Inc., et al.*, No. 10-02863-EJD, Dkt. 544 (N.D. Cal. Apr. 3, 2015); *Cisco Sys., Inc., et al. v. Opentv Inc., et al.*, No. 13-00282-EJD, Dkt. 76 (N.D. Cal. Oct. 8, 2018). I am personally familiar with Apple’s safeguarding of proprietary information, but if the Court deems this declaration insufficient, Apple respectfully requests that it be permitted to file a further declaration supporting filing under seal.

1 commercial information.” *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002)
2 (emphasis in original).

3 5. The Court has expressed a desire for these proceedings to be public. To that end, Apple
4 has carefully reviewed its Proposed Findings of Fact and Conclusions of Law and now proposes only
5 those redactions that are essential.

6 6. Specifically Apple seeks only to seal information about (1) non-public financial
7 information; and (2) information that could aid a bad actor.

8 7. Apple first seeks to seal non-public financial information. The public disclosure of such
9 information would cause Apple economic harm and put it at competitive disadvantage. *See Ctr. for*
10 *Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1097 (9th Cir. 2016), *cert. denied sub nom. FCA*
11 *U.S. LLC v. Ctr. for Auto Safety*, 137 S. Ct. 38 (2016) (finding there was a compelling reason for sealing
12 when records contain business information that could be used to harm a litigant’s competitive
13 standing). It would give Apple’s competition confidential information about Apple’s business model
14 and strategy. *Apple Inc. v. Samsung Electronics Co., Ltd.*, 727 F.3d 1214, 1228 (Fed. Cir. 2013)
15 (concluding the district court abused its discretion in denying a motion to seal about “profit, cost, and
16 margin data”).

17 8. The information Apple seeks to protect is foundational to its business, and Apple has
18 exerted great effort and undertaken substantial expense to protect such information. Apple has
19 narrowly tailored its sealing request so as to maximize the public’s access to court proceedings without
20 jeopardizing Apple’s business interests

21 9. Second, Apple respectfully requests that the Court seal the identified information that
22 could aid a bad actor. Specifically, Apple seeks to seal specific information about Apple’s security
23 policies and internal processes like Apple’s App Review process. Sealing of court records is
24 appropriate “when such ‘court files might . . . become a vehicle for improper purposes,’” *Kamakana*,
25 447 F.3d at 1179 (quoting *Nixon*, 435 U.S. at 598).

26 10. Public disclosure of this information would risk providing assistance to competitors and
27 third parties seeking to unlawfully access or steal data. Apple takes many steps, and undertakes
28 substantial efforts, to safeguard information—including its trade secrets and private confidential data

1 of its customers and developers—and keeping those efforts confidential is important to their
2 effectiveness.

3 11. Not only does Apple protect critical information through its internal security systems
4 and processes, Apple also protect users and developers alike from fraud, malware, and unwarranted
5 intrusion into their privacy through its extensive App Review Process. Disclosure of the identified
6 information would allow bad actors to circumvent Apple’s important review process and would
7 endanger users and developers.

8 12. I have met and conferred in good faith with counsel for Epic, including by telephone, in
9 an effort to narrow the documents and testimony that the parties propose to maintain under seal. This
10 process has resulted in narrowing the amount of designated confidential material and consequently
11 reduced the need for provisional sealing (pursuant to Local Rule 79-5(e)) of material designated by the
12 other party as confidential. The redacted versions of the Proposed Findings of Fact and Conclusions
13 of Law reflect the results of that negotiation.

14 13. However, the parties have not had an opportunity to inspect the opposing party’s
15 Proposed Findings of Fact and Conclusions of Law. In addition, the parties have requested the
16 provisional sealing of certain information in which third parties may have confidentiality interests
17 (whether the party’s information was produced by such third party or by one of the parties). It is thus
18 not feasible at this time for the parties to execute a stipulation of sealing.

19 14. The parties therefore have agreed, after filing, to promptly review any redacted portions
20 of the opposing party’s Proposed Findings of Fact and Conclusions of Law. The parties will promptly
21 withdraw any request for provisional sealing to the extent possible based on their review of the other
22 party’s filing and will meet and confer in good faith to resolve any objections to any remaining requests
23 to seal. If a party opposes the redactions proposed by another party, it will file such opposition by
24 April 12, 2021, on the same day each must file a declaration in support of any request to seal. The
25 parties will also cooperate to provide prompt notice to any third parties who may have confidentiality
26 interests in information provisionally sealed in the Proposed Findings of Fact and Conclusions of Law
27 so that those third parties may determine whether to request sealing of such information by the Court.
28

15. Below is a chart detailing the specific items of Apple's that are sealable for the reasons explained herein, highlighted in yellow in the attached unredacted version.

Paragraph of Proposed Findings of Fact	Reason for Redaction
74.6	Contains confidential information that could be used to evade the App Review process
79	Contains confidential information that could be used to evade Apple's security protocols
81	Contains confidential information that could be used to evade Apple's security protocols
83	Contains information that could be used to evade Apple's security protocols
120	Contains confidential information that could be used to evade the App Review process
122	Contains confidential information that could be used to evade the App Review process
123	Contains confidential information that could be used to evade the App Review process
125	Contains confidential information that could be used to evade the App Review process
128	Contains confidential information that could be used to evade the App Review process
139	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage
215	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage
224.6	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage
225	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage
343	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage
498	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage
499	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage
577	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage
669	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage
706	Contains confidential information that could be used to evade Apple's security protocols
Paragraph of Conclusions of Law	Reason for Redaction
295	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage

16. Pursuant to Local Rule 79-5(e), below is a list reflecting the information designated by other parties as confidential, on which Apple takes no position, highlighted in blue in the attached unredacted version:

Paragraph of Proposed Findings of Fact	Reason for Redaction
165.3	Epic or Third Party Designation
165.4	Epic or Third Party Designation
245	Epic or Third Party Designation
246	Epic or Third Party Designation
249.17	Epic or Third Party Designation
118	Epic or Third Party Designation
218	Epic or Third Party Designation
318	Epic or Third Party Designation
250.4	Epic or Third Party Designation
251.5	Epic or Third Party Designation
255.2	Epic or Third Party Designation
257.2	Epic or Third Party Designation
257.3	Epic or Third Party Designation
260	Epic or Third Party Designation
266.4	Epic or Third Party Designation
267.1	Epic or Third Party Designation
267.2	Epic or Third Party Designation
268.1	Epic or Third Party Designation
268.2	Epic or Third Party Designation
272	Epic or Third Party Designation
273.1	Epic or Third Party Designation
274.1	Epic or Third Party Designation
282	Epic or Third Party Designation
293	Epic or Third Party Designation
296	Epic or Third Party Designation
317	Epic or Third Party Designation
352	Epic or Third Party Designation
353	Epic or Third Party Designation
355.2	Epic or Third Party Designation
356	Epic or Third Party Designation
357	Epic or Third Party Designation
372	Epic or Third Party Designation
381	Epic or Third Party Designation
399	Epic or Third Party Designation
399.2	Epic or Third Party Designation
399.4	Epic or Third Party Designation
399.5	Epic or Third Party Designation
399.6	Epic or Third Party Designation
410	Epic or Third Party Designation
462	Epic or Third Party Designation
467.4	Epic or Third Party Designation
468	Epic or Third Party Designation

Paragraph of Proposed Findings of Fact	Reason for Redaction
472	Epic or Third Party Designation
474	Epic or Third Party Designation
477	Epic or Third Party Designation
494.2	Epic or Third Party Designation
502	Epic or Third Party Designation
503.1	Epic or Third Party Designation
503.2	Epic or Third Party Designation
503.3	Epic or Third Party Designation
503.4	Epic or Third Party Designation
503.5	Epic or Third Party Designation
505	Epic or Third Party Designation
506	Epic or Third Party Designation
515	Epic or Third Party Designation
516	Epic or Third Party Designation
518.2	Epic or Third Party Designation
518.3	Epic or Third Party Designation
529.3	Epic or Third Party Designation
534.3	Epic or Third Party Designation
534.4	Epic or Third Party Designation
535	Epic or Third Party Designation
536	Epic or Third Party Designation
568.1	Epic or Third Party Designation
571	Epic or Third Party Designation
577	Epic or Third Party Designation
618	Epic or Third Party Designation
621	Epic or Third Party Designation
697.1	Epic or Third Party Designation
697.3	Epic or Third Party Designation
697.4	Epic or Third Party Designation
Paragraph of Proposed Conclusions of Law	Reason for Redaction
86	Epic or Third Party Designation
476	Epic or Third Party Designation
696	Epic or Third Party Designation
697	Epic or Third Party Designation
763	Epic or Third Party Designation
774	Epic or Third Party Designation
799	Epic or Third Party Designation
822	Epic or Third Party Designation

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Declaration was executed on April 7, 2021 at San Francisco, California.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

/s/ Rachel S. Brass
Rachel S. Brass